IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2208 OF 1987

1A. MISS JANKI BHOJRAJ MAKHIJA)
of Bombay Indian Inhabitant)
the Sole Executrix of the Last)
Will and Testament of the)
Plaintiff No.1 residing at)
62-A, Collector Colony,)
Chembur Colony, Bombay 400 074.)

2. MISS MOHINI BHOJRAJ MAKHIJA,)
3. MISS SAVITRI BHOJRAJ MAKHIJA)
Plaintiffs No.1 to 3 all of)
Bombay Indian Inhabitants)
residing at 62-A, Collector)
Colony, Chembur Colony,)
Bombay 400 074.)..PLAINTIFFS

VERSUS

1. LACHHMADAS BHOJRAJ MAKHIJA,)

2A. SMT. VANDANA wd/o NARAYAN BHOJRAJ)
Makhija, of Bombay Indian)
Inhabitant, the Sole heir and)
legal representative of the)
defendant No.2, since deceased,)
residing at 62-A, Collector)
Colony, Chembur Colonhy,)
Bombay 400 074.)

3. ARJUN BHOJRAJ MAKHIJA)
4. MISS GANGA BHOJRAJ MAKHIJA)
5. MISS JANKI BHOJRAJ MAKHIJA)
6. MISS GOPI BHOJRAJ MAKHIJA)
7. SHYAM BHOJRAJ MAKHIJA,)
Defendants No. 1 to 7, all of)
Bombay Indian Inhabitants)
residing at 62-A, Collector Colony,)
Chembur Colony, Bombay 400 074,and)
8. SMT. SUSHILA widow of)
Ramchand Bhojraj Makhija of Bombay)
Indian Inhabitant, the sole)_
heir & legal representative of)
Defendant No.8, since deceased)
residing at Laxmi Colony at)
Chembur, Bombay 400 074.

9. MRS. JYOTI PRAKASH ASWANI,)

an Adult, Indian Inhabitant,)
residing at 709, Sun-Cop, Hsg.)
Society, Four Bunglows,)
Andheri (West), Bombay.)..DEFENDANTS

Mr. S.N.Vaishnawa i/b. N.M.Vaishnawa & Co. for Plaintiffs.
Mr. H.K.Vazirani for Defendants Nos.1 & 2A.
Mr. V.M.Talreja for Defendant No.3.

CORAM: S.K.SHAH,J.
JUDGMENT RESERVED ON 26.9.2006.
JUDGMENT PRONOUNCED ON: 04.10.2006.

ORAL JUDGMENT:

1. The Plaintiffs have filed the suit for appointment of an Administrator in respect of the assets, moveable and immovable, left by the deceased and for direction to give accounts of all the assets.

. Deceased, Laxmibai, is the widow of Bhojraj Makhija. The Plaintiffs Nos. 2 and 3 and the Defendants Nos. 4,5 and 6 are the sons of deceased Bhojraj. Defendant No.9, who was subsequently added as party, is the granddaughter of Bhojraj. The original plaintiff Nos.1,

3, Defendant No.6 and Defendant No.7 have expired during the pendency of the suit, each leaving Will bequeathing the property that may fall to their share.

. Bhojraj Makhija expired on 18.5.1967. He hailed from Pakistan. There he was employed in a Port Trust at Karachi. After his retirement and after partition, he migrated to India in 1947 along with his children. After retirement, he had received certain retirement benefits.

. The Plaintiffs allege that after migration, Bhojraj acquired a piece of land in Chembur upon which he put up a structure and started residing therein along with the members of his family, viz. Plaintiffs and the Defendants. The said house situates at 62-A, Collector Colony,Chembur Colony, Bombay 400 074. During his lifetime, he also acquired a piece of land for the purpose of setting up of a business in the name of his elder son, Bhagwandas and later got the business transferred to his own name in the Government records. The said piece of land was Plot No.1803(3-D) situate at adjacent to the old Barrack, newly numbered as 064009 R.C.C. Barrack No.7, situate at Chembur Colony, Chembur, Bombay - 400 074. The Plaintiffs allege that the deceased Bhojraj had constructed on the said plot and carried on business in the name and style of

"Makhija Stores" near Netaji Market Main Road, Chembur Colony. They allege that the said business was a proprietory concern of the deceased Bhojraj. Deceased Bhojraj was assisted by his sons, including Defendant Nos. 1 to 3 and 7 and 8. The business was that of General Stores which continues till today. The shop consisted of ACC Sheets and was assessed for the rent purpose at Rs.36/- per month and the rateable value was Rs.375/- per annum.

. Bhojraj died in Bombay on 18.5.1967, leaving behind the house, shop premises and the business of Makhija Stores. The Plaintiffs allege that the suit estate after the death of Bhojraj belongs to all the Plaintiffs and the Defendants and have been administered jointly by Plaintiff No.1, Defendant No.1 and Defendants Nos.2 and 3. However, the accounts of the business were maintained only by the Defendant No.1. They allege that from out of the income of the business of Makhija Stores, the amount of Rs.1200/- per month was taken by the Plaintiff No.1 for herself and for other heirs and the entire amount was being utilised for the family expenses. They further allege that Defendant No.3 was taking a sum of Rs.500/- per month and was also contributing the same for family expenses. Defendant No.1 was withdrawing Rs.1300/- per month for his maintenance and contribution towards the family

expenses. This arrangement continued right upto August/September, 1986.

. The Plaintiffs further allege that after Defendant No.1 got married in 1984, he got separated his kitchen from the Plaintiffs in August 1986 and thereafter completely stopped making the payments and started attempts to exclude the Plaintiffs and the other defendants from the administration of the estate of the deceased Bhojraj with effect from about September, 1986. As a result, the Defendant no.3 - Arjun went to Dubai for service. The Plaintiffs allege that they tried to persuade the Defendant No.1, but the Defendant No.1 had designs to deprive the Plaintiffs and the other defendants from their lawful share and dues in the estate of the deceased. The Defendants stopped showing books of accounts as also making monthly payments for the purpose of the family. Therefore, the Plaintiffs by their Advocate's letter dated 5.2.1987, called upon the the Defendant no.1 to make payments and not to exclude the Plaintiffs from administration of the estate of the deceased Bhojraj. However, by his Advocate's letter dated 21.2.1987, the Defendant no.1 falsely replied the Plaintiffs' Advocate's letter and claimed that the business of Makhija Stores was run by him as his proprietory concern alleging that he was paying rent of Rs.300/- per month to his father deceased Bhojraj.

Attempts of persuasion failed and, therefore, the Plaintiffs filed the aforesaid suit.

2. Defendants Nos. 3 to 6 and 8 and 9 have filed Written Statement supporting the case of the Plaintiffs. . The other defendants, except defendant No.1, have not filed any written statement.

3. Defendant No.1 resisted the suit by his Written Statement dated 8.3.1988. He contends that after having migrated in 1947, he had accompanied his father, deceased Bhojraj, to Karachi for certain recoveries to be made from the Port Trust. After return, a plot was obtained and the shop was constructed thereon by him but with the advice of his father Bhojraj. That shop was constructed somewhere in 1951. It is he who had started the business and was carrying on the said business in the name and style of Makhija Stores as its sole proprietor. He contends that his father Bhojraj had retired and was old enough, was helping him and advising him when necessary. He alone was managing the affairs of the business. He contends that his father had made every child well settled and got them good independent jobs for maintaining themselves. He further contends that he used to pay a sum of Rs.300/- per month to his father till he was alive as rent for the use and

occupation of the shop. He contends that various business and other documents that had been issued from time to time were issued in his name as proprietor of Makhija Stores. He himself used to pay the taxes.

4. It is further the contention of the Defendant No.1 that after his father expired in 1967, he has been continuously, exclusively and without obstruction and interruption from anyone has been in possession of the plot and the shop thereon for more than last 36 years and, therefore, by an adverse possession claimed exclusive right, title and interest therein.

5. With regard to the residential house/bungalow, the Defendant No.1 admits that the said bungalow belongs to the Plaintiffs and the Defendants and other heirs and legal representatives of his deceased father. On these contentions, he claimed dismissal of the suit.

6. In view of these rival contentions, the following issues are framed against which I record my findings for the reasons given hereinbelow.

ISSUES	FINDINGS
1. Do the plaintiffs prove that the deceased Bhojraj started and carried on business as proprietary concern in the	In the affirmative.

	name and style of M/s.Makhija Stores, near Netaji Market, Main Road, Chembur Colony, Mumbai?	
1a)	Whether the suit is barred by law of limitation ?	In the negative.
2.	Do the plaintiffs prove that the plaintiffs and the defendants were dependent on the income of the said business M/s. Makhija Stores?	In the affirmative.
3.	Do the plaintiffs prove that the Defendant No.1 started managing the affairs of the business of M/s. Makhija Stores since 1986 to the exclusion of the plaintiffs and other defendants?	In the affirmative.
4.	Do the plaintiffs prove that they are the legal heirs of deceased Bhojraj and that each one of the heir of the deceased Bhojraj has 1/11 share in the estate of the deceased Bhojraj ?	In the affirmative. each one of the heirs would be entitled to 1/12th share.
5.	Does defendant No.1 prove that he constructed the shop in 1951 or otherwise and is doing business of M/s. Makhija Stores as its sole proprietor?	In the negative.
6.	Does defendant No.1 prove that the suit property exclusively belongs to him, and that he is the owner thereof?	In the negative.
7.	What other order or relief ?	Suit is decreed.

ISSUES NOS. 1, 2, 3, 5 & 6 :

7. There is no dispute so far as the suit bungalow is concerned. It was allotted to Bhojraj. It was the property of Bhojraj till the time of his death in 1967 and, therefore, it is the joint family property.

8. The plaintiffs' witness, Janki and defendant No.3 - Arjun Bhojraj, who are supporting the plaintiffs' case, have given evidence, on the other hand, the defendant no.1 has examined himself.

9. Janki and Arjun, defendant No.3 have stated in their evidence that the commercial plot was taken by their father Bhojraj and it is Bhojraj who constructed the shop premises and also started grocery shop in the name and style of "Makhija Stores" on the said plot. It is not in dispute that Bhojraj originally hailed from Pakistan. He was serving at Karachi Port Trust. He retired from service and came to India somewhere in 1947. It is further undisputed position that in 1949 or 1950, he had gone back to Karachi along with defendant No.1 as he averred in his written statement for collecting his dues from the Port Trust. It is further undisputed that after he returned, the plot was acquired and the business was started.

10. The defendant No.1 has disputed that Bhojraj had constructed the shop premises and started business of Makhija Stores. According to him, the plot was acquired in the name of Bhagwandas, the eldest son of Bhojraj who was then serving in Indian Navy. It is further his case that after the plot was acquired, he constructed the

structure of the shop premises and started his business and it was his proprietory business. It is his case that he has been paying taxes; that all the licences required under the Shops & Establishment Act and other acts were standing in his name and, therefore, he says that business is proprietory concern.

11. Janki has admitted in her cross-examination that the plot of land of shop was allotted in the name of Bhagwandas and that allotment was made in 1951. The defendant No.1 has also admitted this position and he further states that at the relevant time when the plot was allotted, Bhagwandas was serving in Navy. The case of the plaintiffs however is that although the plot was allotted in the name of Bhagwandas, it was Bhojraj who had spent for paying the price of the plot and also spent for constructing shop premises and for starting business. Neither the plaintiffs nor the defendants have produced any document of property. Therefore, in this regard, we will have to go by oral evidence led by the parties. The plaintiffs' witness, Janki has admitted the allotment having been made in the name of Bhagwandas. She further states that later on, it was transferred in the name of Bhojraj. Even for this transfer, there is no documentary evidence on record.

12. In view of the rival claims of the parties, it

would however, be necessary to see that though the plot that may have been allotted in the name of Bhagwandas, who had spent for it and who had made the construction of the shop and who had started the business. In this regard, the case of the defendants is diverse. In reply, Exhibit P-8, to plaintiffs' notice, the defendant No.1 had stated that tax receipts of the suit plot and the shop premises was in the name of his father. In the same reply, the defendant has also taken the stand that he was paying Rs.300/- per month to his father Bhojraj by way of rent. The same contention has been raised by him in his written statement. When he was confronted with these contention in his cross-examination, he said that the contentions were false. He, therefore, shifted his stand. It is however, admitted position that only capital that was available in 1951 or contributed was the dues received by Bhojraj from Port trust where he was serving. The defendant no.1 has specifically admitted that when he migrated to India from Pakistan, he was minor. He also admits that he had no source of income at that time and that he was around 16 years of age. In view of this admitted position, it is beyond doubt that Bhojraj had utilised this fund received from Port trust where he was employed at the time of retirement for the purpose of construction of the shop and for starting grocery business in the name of Makhija Stores. It is nobody's case that Bhagwandas had

contributed to the business and for construction of the shop premises. When the defendant No.1 was not earning anything, it is difficult to believe at this stage that he had constructed the shop premises and started business. Moreover, he was minor at the time when the business was started. At one stage, in cross-examination, defendant No.1 has admitted that he was unemployed when he migrated; that the shop was constructed in 1949 and that in 1950, he was 16 years of age. A new case was tried to be set up by the defendant No.1 in his evidence that when he stated that he had borrowed money and out of that money he had constructed the shop premises and started business. However, this plea has not been taken in the written statement. He also does not have any evidence in that regard as to from whom he borrowed money, as to what amount he borrowed, and as to when he repaid this money. Therefore, evidence of defendant No.1 in this regard is totally unbelievable. He is not a trustworthy person. At one stage, he tried to raise another contention to the effect that the members of the family used to be maintained from the pension that Bhojraj was getting. However, this plea is not taken in the written statement. The defendant no.1, in fact, has admitted that Bhojraj had got lumpsum amount from the Karachi Port Trust after he migrated from Karachi to Bombay. There is no evidence of Bhojraj getting pension at any

time.

13. The defendant No.1 has produced on record, various licences that are standing in his name. However, those licences which are produced are after 1986-1987. Therefore, they are, in fact, irrelevant for the purpose of deciding whether the shop and the business was set up by Defendant no.1 or Bhojraj. Moreover, the dispute between the parties started in 1986-87 itself. This evidence therefore is of no help to the defendant No.1 in establishing his case. At Exhibit D-1/A, the defendant No.1 has produced Form No.E which is a return of medical preparations sold from the period from 1.3.1954 to 31.3.1954. The defendant No.1 admits that it is in his writing.However,there is nothing on record to indicate that this document was ever submitted to the concerned authority. This document also does not bear any seal or acknowledgment to show that such a form was filed before the concerned authority. The defendant no.1 has admitted in his cross-examinatiion that he does not have any document to show that he had paid any taxes or bills between 1967 and 1987. What is material to be noted is that Bhojraj expired in 1967. It is undisputed that since after 1967, the defendant No.1 has been running business and it is for the first time in August 1986-87 he disputed and made attempts to exclude the plaintiffs and the

other defendants from the benefit of getting money from the earnings of the business run in the suit shop. Even during the lifetime of Bhojraj, as contended by the defendant No.1, he was paying rs.300/- per month as rent. This contention clearly shows that the shop premises and the business was owned by Bhojraj. If that was not so, there was no reason for the defendant No.1 to make that payment. Realising this difficulty, he changed the stand and stated in his evidence that the contention raised by him in the written statement and also stand taken by him to that effect in reply Exhibit P-8 was false.

14. It is further to be noted in cross-examination the defendant No.1 has admitted that the Collector allotted the plot at the concessional rate as the family was refugee. This obviously was done in 1950-51 when the defendant No.1 was hardly 16 years of age. The plot at this stage could not have been allotted in favour of the defendant No.1 when his elder brother Bhagwandas and his father Bhojraj were alive. it is undisputed that Bhagwandas at the relevant time was continuing to serve in Indian Navy and obviously, therefore, he could not have any interest in setting up a shop and constructing shop premises and also setting up grocery business in the suit shop. Moreover, the only member who was having money was Bhojraj. Therefore, there should be no hesitation to hold that deceased Bhojraj who had made

the construction of the shop premises and started grocery business in the name and style of Makhija Stores. It is possible that since the business was started after Bhojraj had retired from the service of Port Trust the business may have been looked after by defendant No.1, who is the second son of Bhojraj, first being Bhagwandas who was employed in Navy. There is evidence of Janki as also of Arjun - defendant no.3 that defendant No.1 alone was not looking after the business, but all the members of the family were managing the business jointly.

15. Much stress was led by the learned Counsel representing defendant No.1 on the fact that all other members, except defendant No.3 - Arjun, were serving and having their independent income. That aspect however cannot help the defendant No.1 in proving that the shop and the business run in the shop were not started by defendant No.1. It is an admitted position that Bhojraj saw to it that other members of the family get employed and earned for themselves. We are not concerned much with that aspect of the matter as what we are concerned with is whether Bhojraj had constructed the shop premises and started the business.

16. Under these circumstances, it is established that Bhojraj had constructed the the shop premises and started the business in the name and style of Makhija

Stores where grocery business was being run. It is, therefore, established that the plaintiffs and the defendants, being his legal representatives have share in that joint family property. So far as the bungalow is concerned, it is an admitted position that it was of Bhojraj and, therefore, it was a joint family property of the plaintiffs and the defendants.

17. It is well settled that there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden therefore would lie in the first instance upon the person who claims any property to be joint property. As such, the burden in this case would be on the plaintiffs to prove that the shop premises and the business conducted therein was a joint family property as having been set up by Bhojraj. Once it is established that it was Bhojraj who had set up the shop and the business, then the burden will be on the defendant No.1 to prove that it is not a joint family property. In this regard, the defendant No.1 has failed to prove that the shop premises and the business run therein was not a joint family property as having not been set up by Bhojraj but it was set up by him. The defendant No.1 has also failed to prove that there was any partition between the plaintiffs and the defendants with regard to this property.Therefore the said property would continue to

be joint family property of plaintiffs and defendants.

18. So far as the bungalow is concerned, the case of the defendant no.1 is that initially there were only four rooms and now there are eight rooms. At one stage, he claimed that there were 9 rooms and then he claimed there were 11 rooms. However, in cross-examination, he admitted that the bungalow is in two parts - 62A and 62B. He admits that he is in part 62A and in that part there were four rooms. he further admits that he is in occupation of only two rooms and the other two rooms are in possession of the widow of his brother Naumal Bhojraj Makhija. He further admits that there are in all five rooms and not four and the fifth room is occupied by defendant No.3. He further admits that the said 5th room is a pakka room and it was constructed by defendant no.3. He further states that on plot No.62B, there are in all four rooms and they are occupied by the plaintiff Nos. 1, 2 and defendant No.4. Thus, whatever number of rooms there may be, they are in possession of the plaintiffs and the defendants, including two rooms in possession of the defendant No.1. The case of the defendant No.1 is that besides the four rooms, all other rooms four or five were constructed by him and he claims independent ownership. However, his contention is not worth believing. This is so, because what he was earning was only by running the business which was set up by his father Bhojraj. Therefore, since for the need

of the joint family whenever they were to make construction of remaining four rooms that was made from the earning of the joint family business and as a result those 4 - 5 rooms would also become the property of the joint family and not of defendant No.1 independently. Thus, even in this regard, the defendant No.1 has failed to establish his case.

19. Both the witnesses - Janki and Arjun - defendant No.3 have stated in their evidence that even after the defendant No.1 started managing the affairs of the business, the entire family was being maintained on the income from the business. Deceased plaintiff No.1 - Laxmibai was getting Rs.1200/- per month for the maintenance of the family. They further stated that defendant No.1 was married in 1984 and it is thereafter they separated. Defendant No.1, according to them, was also maintaining himself and his family from the income of the business, while he continued to pay for the maintenance of the family of the plaintiffs and other defendants. This evidence has gone unchallenged. On the side of the defendant No.1, there is only denial. As stated above, the defendant No.1 is not a reliable witness and his evidence is not reliable at all.

20. Under these circumstances, issue Nos.1, 2 and 3 shall have to be answered in the affirmative and issues Nos. 5 and 6 in the negative.

ISSUE NO.1A:

21. It is vehemently submitted on behalf of defendant No.1 that the suit in respect of the bungalow is bared by limitation. It is also his submission that the suit having been brought after a lapse of 20 years after the death of Bhojraj in 1967, the suit is barred by limitation. It is undisputed that the property of suit bungalow has been added to the Schedule of properties only by way of amendment. However, that does not make the claim with regard to the bungalow having been barred by limitation. This is so, because so far as the bungalow is concerned, the defendant No.1 himself has admitted in the written statement that the bungalow was acquired by Bhojraj. When it is an admitted position that the bungalow was the joint family property, it continues to remain joint family property till there is partition. The defendant No.1 has also raised the plea of having become owner of the property by way of adverse possession. However, the contention in this regard is also not tenable because the property continues to remain joint till it is partitioned. It is nobody's case that either the bungalow or the shop and the business have been partitioned among the plaintiffs and the defendants after the death of Bhojraj in 1967. As such, the suit with regard to the bungalow cannot be

said to have been barred by limitation.

22. The learned Counsel for the defendant No.1 has stated that since defendant No.9 - Jyoti being the only daughter of Bhagwandas, her claim now is clearly barred by limitation. This contention is not acceptable at all. If the defendant No.9 - Jyoti is entitled to the share in the joint family property, that cannot be said to have been barred so long as the property remains the property of the joint family. As such, this issue shall have to be answered in the negative.

ISSUE NO. 4

23. During the pendency of the suit, the original plaintiff No.1 - Laxmibai, the widow of Bhojraj, has expired, as also Gopi Bhojraj - defendant No.6 and Shyam Bhojraj - defendant No.7 during the pendency of the suit. Similarly, original defendant No.2 - Narayan Bhojraj has also expired. Similarly, plaintiff No.3 has also expired. All of them have left behind their Will making bequest of the property that may fall to their share. As such, it would be necessary to ascertain their shares along with those who are alive. Plaintiff No.3 - Savitri has made a bequest in favour of the defendant No.9 who happens to be her niece.

24. The relations between the parties is not in dispute. The deceased Laxmibai is the widow of Bhojraj. Janki (original defendant No.5) has been transposed as plaintiff No.1A in place of Laxmibai. Mohini (plaintiff No.2), Savitri (deceased plaintiff No.3), Ganga (defendant No.4) are daughters of Bhojraj. Defendant No.1 - Narayan (deceased defendant No.2) represented by his widow Vandana (now defendant No.2A), Arjun (defendant No.3), Shyam (deceased defendant No.7) and Ramchand (deceased defendant No.8) now represented by his widow Sushila (defendant No.8A) are the sons. Defendant No.9 is the daughter of deceased Bhagwandas and grand-daughter of deceased Bhojraj. All the heirs being Class I heirs, they would take equal share and each of the heirs would be entitled to 1/12th share.

25. Hence, the following order :-

> **The Suit is decreed in terms of prayer clauses (a), (b), (c) and (h). Decree be drawn accordingly.**

26. Receiver stands discharged on compliance of the decree, subject to accounts and his fees.

27. The learned Counsel for defendant No.1 requests

for stay of this decree for a period of six weeks. The decree be stayed for a period of six weeks from today.